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MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-1607

HAWAIIAN AIRLINES, INC., *Petitioner,*

vs.

ALOHA AIRLINES, INC., *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Cases	Pages
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The Respondent's brief underscores the exceptionally important question as to whether the number of flights flown by an air carrier over routes specifically approved and authorized by the Civil Aeronautics Board is a matter for the CAB or a matter for a federal antitrust jury. Since the CAB has the sole responsibility to approve, withdraw, or suspend the route authority of an air carrier, it flies in the face of the Congressional intent to hold, as did the courts below, that an antitrust jury may sit in judgment upon and second guess the wisdom of the CAB in specifically approving a route and/or refusing to withdraw or suspend such route authority. If the lower courts are correct, then the most basic and fundamental power of the CAB—the granting,

control and supervision of route authority for air carriers throughout the country—will be substantially imperiled and subject to varying and non-uniform interpretations by different antitrust courts and juries. Air carriers will be placed in the position of discounting the authorizations of the CAB because of a possible antitrust suit challenging the wisdom of the CAB in granting route authority and/or refusing to withdraw or suspend such authority.

In September 1967, the CAB, in its own wisdom, authorized HAL and Aloha, unlike any other competing air carriers in the United States, to schedule flights over identical routes. (App. p. 286, Note n6.) As a result of that identical route authority, the CAB initiated a route investigation stating that:

> "One possibility which in our judgment deserves to be explored is that the carriers' present route structure leads them to engage in uneconomic levels of competition. Since September 1967 the two carriers have held identical authority, and they in fact compete on equal terms in the great majority of the interisland markets. *It may be*—we intimate no tentative conclusion on the matter—*that the complete identity of the two carriers' authority* (a situation which prevails nowhere else in the regulated air transport industry) *has set in motion competitive forces which have led to a destructive level of competition, and that cutting back or restricting the authority of either or both carriers, so that their authority would no longer be identical, would lead to a healthier situation.*" (App. 286-287.) (Emphasis added.)

Thus, the CAB recognizing that its own decision in approving identical routes may be the cause of the fierce

competition between the two carriers, commenced a route investigation to determine whether or not that initial wisdom should be re-examined by "cutting back or restricting the authority of either or both carriers so that their authority would no longer be identical."

In addition to the CAB conducting a route investigation to determine the wisdom of its initial decision in 1967 in approving identical routes, the CAB specifically authorized the two airlines to discuss the possibility of merging, and the CAB specifically approved a scheduling agreement between the two airlines in settlement of the two carriers' complaints against each other filed in the CAB alleging unfair competition—each charging that the other had too many flights over its approved routes. After the CAB specifically approved the scheduling agreement between the two air carriers, it dismissed its route investigation but specifically retained jurisdiction to re-open the investigation to determine whether or not, as the CAB originally stated, "that cutting back or restricting the authority of either or both carriers would be necessary." (App. 286, 287.)

In dismissing the route investigation, the CAB stated:

> "We are mindful that our *continuing review of the carriers' scheduling practice* and their operating expense may disclose a subsequent need to renew the investigation."

In the light of this affirmative action by the CAB to control and supervise the number of flights by the two carriers over their approved routes, it is simply contrary to the Congressional mandate creating the regulatory body that a federal antitrust jury should sit in judgment and second-guess the wisdom of the CAB in (1) specifi-

cally approving the identical routes, (2) specifically approving the scheduling agreement, and (3) refusing, in light of the scheduling agreement approved by the CAB, to withdraw or suspend the route authorization of either or both carriers. There is nothing more fundamental in the CAB than its authority to approve the routes of an air carrier or to withdraw or suspend such authority. Clearly, the question of whether or not this is within the exclusive jurisdiction of the agency or rather is the determination to be made by an antitrust jury that has neither the expertise nor the Congressional grant to involve intself in such a decision, is a question of exceptional importance that must be decided by this Court so that the nation's air carriers may know how they stand before the CAB and so that the CAB is not made to appear to be a Congressional creation of form rather than substance.

As is self-evident, the Petitioner does not seek that this Court grant "total immunity" to air carriers from all prosecution under the antitrust laws. Rather, as is equally plain, the Petitioner seeks a determination by this Court that the exercise of the CAB's wisdom, which is outside the control of the air carriers, not be made the subject matter of lengthy, expensive and protracted antitrust litigation against an air carrier.

Further, in its attempt to control and supervise the situation created in 1967 when the CAB granted identical route authority, the CAB specifically authorized the carriers to discuss the possibility of merging. By Order 73-2-84 (App. 284), the CAB ordered that the two carriers' application for merger approval be dismissed. The Order, dealing not only with the application

of Aloha and Hawaiian but also with Northwest and Northeast Airlines, specifically dismissed the applications in view of the fact that "In the case of each of the proceedings one of the parties thereto determined to withdraw from the merger agreement." (App. 284.) This specific Order followed a hearing by the CAB into the reasons given for the withdrawal. To now assert, as ruled by the courts below, that the CAB should not have dismissed the proceedings or should have dismissed the proceedings but exercised its authority over routes is nothing less than a second guessing of the CAB's wisdom in doing what it did. The approval or disapproval by the CAB of a merger application for reasons sufficient to itself should not be the subject matter of an antitrust suit. Were it otherwise, every disapproval by the CAB of a merger application because one party decided to withdraw would be the subject of an antitrust suit alleging bad faith merger negotiations—a highly questionable cause of action even in a non-regulated industry.

Likewise, the Respondent's brief dramatically illustrates that this Court should decide that, at the very least, the CAB has primary jurisdiction to determine whether an air carrier has violated one of the agency's rules. In this case, both air carriers have filed complaints with the CAB against each other, each charging that the other had too many flights over its CAB-approved routes, and Aloha further alleging bad faith merger negotiations. The CAB never decided those complaints—rather, the CAB specifically approved a scheduling agreement in settlement and dismissal of the enforcement proceedings brought by the air carriers against each other. (App. 199-201.) Even in that action, the CAB stated that:

> "The Board will retain continuing jurisdiction over this agreement and may modify its approval of, or disapprove, the agreement at any time without hearing, or take whatever action may be deemed appropriate." (App. 201.)

Those complaints were then dismissed "without prejudice." Now, both the Respondent and the courts below say that there is nothing for the agency to decide.[1]

Yet the only time in which the two carriers complained against each other on the grounds that the other had too many flights was in the enforcement proceedings. Those proceedings, dismissed without prejudice, clearly and at the very least must be decided by the CAB before a fed-

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[1]The Respondent and the courts below take the incredible position that Aloha's application for a subsidy to the CAB is tantamount to a determination of the enforcement proceedings. Indeed, the District Court below has deemed it sufficient to apply collateral estoppel in this antitrust case based upon that subsidy application. The Court of Appeals denied Petitioner HAL's writ of mandate or prohibition on that question. (Aloha suggests that this is a determination on the merits, but see this court's decision in *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), in which both the majority opinion and the dissenting opinion agree that a denial of a writ of certiorari is not a determination on the merits.) To further illustrate the paucity of the lower court's holding that the subsidy application decided the enforcement complaints, Aloha originally and unsuccessfully sought the self-same examiner in the subsidy application to apply the findings that he made in the subsidy proceeding as fact in the enforcement proceedings. This the examiner declined to do on the ground that the enforcement proceedings required a notice and hearing and that the issues involved in the enforcement proceeding were different than Aloha's application for a subsidy. In any event, and regardless of the lower court's failure to recognize that its application of collateral estoppel in this antitrust case based upon Aloha's application for a subsidy effectively deprived Petitioner HAL of its right to trial by jury, the subsidy proceeding can in no wise be a basis for the decision by the court below that there is nothing to send back to the CAB for a decision. It was only in the enforcement proceedings that the issue of too many flights over the approved routes was squarely drawn.

eral antitrust jury steps in to make the decision for and on behalf of the CAB.

For these reasons, and in light of the decisions by this Court in *Pan American Air Ways v. United States,* 371 U.S. 296 (1963), *Hughes Tool Company v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973) and *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1943), this Court should grant Petitioner's petition for writ of certiorari and decide the questions presented which promise to affect the authority of the CAB, its jurisdiction over the wisdom of its own judgments, and the probability that fundamental questions involving route authority may be removed from the CAB to the over-crowded Federal courts.

Dated: May 16, 1974.

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